IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

[illegible]-DADE TRADING, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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GREAT DANE TRAILERS, INC.,
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BRIEF OF RESPONDENT

OPINIONS BELOW

The decision of the Court of Appeals (R. 79-87) is reported at 363 F. 2d 130, 62 L.R.R.M. 2456. The Board's Decision and Order (R. 39-41) are reported at 150 N.L.R.B. 438, 58 L.R.R.M. 1097.

JURISDICTION

The Decision of the Court of Appeals was rendered on June 24, 1966, and a decree was entered on July 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The issue here is whether the Court of Appeals properly held that the Board could not find the Company in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act because it withheld vacation pay claimed to be due striking employees when there was no

evidence of anti-union sentiment and motivation behind such conduct.

STATEMENT

For some years the Union[1] has been the collective bargaining representative of Respondent's employees at its Savannah, Georgia, plant (R. 15-16). On April 30, 1963[2] the Union gave the Company notice terminating the existing contract and on May 16, approximately 348 employees, out of a work force of about 400, went on strike. The parties agreed that this was entirely an economic strike (R. 17). By July 1, approximately 259 of the striking employees had been replaced; by August 1, about 325 had been replaced and by October 8, all of the strikers had been replaced (R. 17, 62-63). By letters dated July 12, a number of the striking employees made demand upon the Company for payment of vacation pay claimed to be due them under the terms of the expired contract (R. 17). In replying to the demand, the Company alluded to the fact that the Union had cancelled the contract approximately two months earlier and there was no contract in force at that time. The Company also raised an important problem, the question of whether the discharged employees would be entitled under the contract to receive vacation benefits, even if the contract were in force. The Company further replied that these were matters which should be resolved at the bargaining table and offered unconditionally to discuss the strikers' entitlement to vacation pay at the next negotiating session (R. 72-73)[3]. The Union elected

[1] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO.

[2] All of the dates are in 1963, unless otherwise indicated.

[3] It was clear from the Company's reply that it considered the matter of the discharged employees' entitlement to vacation benefits to be of sufficient importance to merit discussion thereof at the negotiating sessions. Yet the Board insists upon omitting this fact and implies that the refusal to make immediate payment was solely the result of the Union's termination of the previous contract (Bd. Br. p.4).

not to pursue the matter at the bargaining table (R. 64).

Thereafter, in August the Company did afford vacation pay to employees whose eligibility to receive it was determined solely on the basis of whether they "were there as of July 1st" (R. 61)[4]. It was undisputed that the vacation benefits which were paid in August were in accordance with new plant rules which the Company unilaterally promulgated after the Union terminated the existing contract and were not paid on the basis of the terminated contract, although the new vacation policy was substantially the same as that which existed under the old contract (R. 18, 64). In practice, the new vacation policy afforded benefits to two categories of employees: (1) those who had not gone on strike and thus had remained in the Company's employ through July 1, and (2) strikers who returned and had not been replaced and discharged by July 1. (R. 60-61). Probably fewer than a dozen returning strikers received any vacation benefits under the new policy (R. 60). Other strikers did not qualify under the new policy because they had been replaced and discharged prior to July 1 and consequently they were not employees and were not working on that date (R. 61).

THE TRIAL EXAMINER

The entire theory of the Complaint, which, along with the Answer, framed the issues at the trial, was that the

[4] It is noteworthy that the Company selected July 1, over a month earlier, as the date to qualify for vacation pay. Obviously this would not serve as an incentive for any of the strikers to return to work and it clearly was no reward to any striker who had returned subsequent to July 1. It is also significant that the new policy toward vacation pay was not given advance publicity and therefore did not act as inducement to the strikers to abandon their strike effort. In dismissing a portion of the charge the Board expressly found that the Company had not solicited the employees to abandon their strike and had made no offer of benefit if they would return to work (R. 35).

Company violated Sections 8(a)(1) and 8(a)(3) by withholding from striking employees the vacation pay which accrued to them under the terms of the expired contract (R. 9-10). The Trial Examiner acknowledged that this was the approach taken by the General Counsel (R. 22). There was no reference in the Complaint to the vacation pay which the Company did distribute in August. The Complaint issued in April of the following year. The Trial Examiner was the first to attach any significance to the vacation pay afforded by the Company in August.

Beginning with the new vacation policy, formulated and implemented in August, the Trial Examiner inferred that it represented an unlawful attempt to induce employees not to strike or, in the case of those who did, to abandon the strike and return to work (R. 22-23). The strike, which the employees were to have been induced to refrain from, began approximately three months earlier on May 16. By the terms of the new vacation policy, no striker who returned after its announcement would qualify for any benefits. An unlawful motive was nevertheless inferred from the new vacation policy.

So preoccupied was the Trial Examiner with the vacation pay which was announced and distributed in August, he neglected to discuss the Company's reason for withholding vacation pay which allegedly accrued under the terms of the expired contract. The announcement that it would be withheld came a month earlier and this was acknowledged to be the only real issue regarding vacation benefits. Presumably the Trial Examiner felt there was some connection between the two,[5] inasmuch as he ulti-

[5]There is nothing in the record upon which to base an assumption that the two incidents were related in some fashion. The Company's reply to the demand for accrued benefits was directed to that demand and made no reference to any new vacation policy. There is no evidence whatever that any thought was given to a new vacation policy until later on in the month of August when it was announced.

mately concluded that the earlier incident of withholding benefits was a violation of the Act. He seems to reason that, because the new vacation policy was unlawful, the withholding of benefits under the old policy must have been also. The second inference emerges from the first and the chronological sequence is wrong.

The Trial Examiner recommended dismissal of the remaining charges that the Company had solicited strikers to return to work (R. 24-25).

THE BOARD

The Board affirmed its Trial Examiner's findings and conclusions. It reasoned that the denial of vacation pay to strikers who had not returned by July 1, 1963, "unlawfully discriminated against them because of their adherence to the Union's strike." The allegation in the Complaint was that the Company unlawfully withheld vacation pay from strikers who had requested it; not that it denied such pay to those employees who were still strikers on July 1. This date has no connection with the allegation in the Complaint. It is of significance only in connection with the new vacation policy, which was formulated some time after the event which prompted the charge, i. e. the Company's reply to the request for vacation benefits claimed to be due under the expired contract. The reply made no mention of July 1; it merely stated that, in view of the fact the contract had terminated and there was a question as to whether discharged and replaced employees would qualify, the matter of vacation pay should be discussed at the negotiating sessions then in progress (R. 72-73).

The Board did acknowledge at one point that the July 1 date was something which should be associated with the payment of vacation benefits, as opposed to withholding of such benefits, when it stated it was immaterial whether the vacation pay was given in accordance with the ex-

pired contract or granted as a result of the Company's unilaterally promulgated policy, instituted after the contract expired.

Because the two were considered to be *substantially* the same, the Board turned to a subsection of the expired contract and noted that, according to this provision, the strikers were entitled to some vacation benefits. It added that it was not interpreting the contract for the parties. (R. 39-40). Neither the subsection involved, nor the larger section of which it is a part, contains any reference to employment on July 1 as a prerequisite to qualification for vacation benefits (R. 65-67). In this sense, the contract and the policy are not the same.

COURT OF APPEALS

The Fifth Circuit Court of Appeals, without dissent, denied enforcement of the Board's Order. In doing so it drew from earlier decisions of this Court, including the quite recent decision in *American Shipbuilding Co.* v. N.L.R.B., 380 U.S. 300, 13. L.Ed. 2d 855 (1965). The Court of Appeals determined, as did this Court in *American Shipbuilding*, that a finding of an 8(a)(3) violation will normally turn on employer motivation. It then noted that this Court requires an affirmative showing by the Board of unlawful motivation. The Court of Appeals then turned to the record to determine the basis upon which the Board found anti-union motivation behind the Company's refusal to honor the claim for vacation benefits.

To begin with, it noted the fact that this was the Company's first involvement in an unfair labor practice dispute and the further fact that the companion 8(a)(1) charges were dismissed by the Board. In addition, there was "strong evidence showing otherwise exemplary conduct on the part of the Company during the strike". Finally, there

was a real question as to whether replaced employees were entitled to vacation benefits.

The Court was obliged to conclude there was no supporting evidence whatever for the Board's finding of unlawful motivation and the Board had determined that the refusal to pay vacation benefits was *per se* a violation of the Act. This being the case, the Court viewed its situation as being akin to that which confronted this Court in *American Shipbuilding, supra.* The Court of Appeals then concluded that the Company's action here was not of a nature as to fall within that category of practices, enumerated in *American Shipbuilding*, which are so prejudicial to the interests of the Union and so completely lacking in economic justification as to carry their own inference of unlawful motivation, thereby rendering specific evidence of unlawful intent unnecessary. Since the burden of proving motivation had not been satisfied, there was no substantial evidence in the record as a whole to support the conclusion that the Company violated the Act.

ARGUMENT

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND IN NO SENSE CONFLICTS WITH THE HOLDING IN ERIE RESISTOR.[6]

ANALYSIS OF ERIE RESISTOR

The Board would prefer to urge the applicability of rules derived from another decision and barely touch upon the factual circumstances involved in that same decision. This is not difficult to understand where, as here, any

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[6] *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 10 L.Ed. 2d 308 (1963).

sort of analysis of the facts in the earlier decision would indicate the true basis of the reasoning adopted therein, and a comparison of the two factual situations would demonstrate the inapplicability of that reasoning.[7] We propose to make such an analysis because we feel it is basic to review by certiorari, where a decision is claimed to be in conflict with an earlier decision of this Court.

In the *Erie Resistor* case *all* of the Company's 478 employees joined the strike.[8] This immediately suggests a need to coax some of the employees to return if the Company is to operate with any degree of efficiency at all. Conscious of this need, the employer advised the Union *it was going to* hire replacements and *would* give these replacements some form of super seniority. The replacements were told they were not going to be laid off when the strike was over. Announcing the new policy in advance was obviously designed to induce the strikers to return.

The employer next advised the Union it would give 20 years additional seniority to replacements *and to any striker who returned.* Once again the purpose is obvious and it is equally apparent just to whom the announcement was directed. The results were forthcoming in short order. Four days after this last announcement the Company, which apparently had experienced considerable difficulty finding people to work, hired 34 new employees, 47 returned from layoff and 23 strikers accepted jobs. The following week 64 strikers returned and 21 replacements were hired, bringing the total of replacements to 102 and returning strikers to 87. The week after that 38 more strik-

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[7] The Board apparently adheres to the belief that factual differences between the two cases are of no consequence. (Bd. Br. p. 14).

[8] In the instant case, a nucleus of greater than 10% of the employees remained and were available to work with replacements.

ers returned, bringing the total to 125, and the Union capitulated.

The strike had been quite effective and had been in progress for about 10 weeks before the announcement was made regarding super seniority. Then, within 3 weeks, the Union was brought to its knees and the strike's effectiveness was completely destroyed. It requires no great amount of imagination to discover what brought this about.

Shortly after the strike ended, 173 employees resigned from the Union.

Sometime later there was a cut back in operations and nearly half the work force of 442 employees was laid off. Many of these were reinstated strikers whose seniority was insufficient as a result of the super seniority policy.

Following proceedings before the Board, the *Erie Resistor* case reached the Court of Appeals, which held that the employer's conduct, while otherwise unlawful, was excused upon a showing that it was motivated by business exigencies, i. e. the employer's compelling need to acquire a work force.

This Court reversed. In doing so, it focused its attention on two things: the inherent nature of the employer's super seniority policy and its effect on the strikers.

Beginning with the policy itself, the Court first observed the obvious and signif ant effect it had on tenure. This was pointed up by the experience of returning strikers in connection with the later reduction in work force. This affected all the strikers, the Court said, whereas replacement only affects those who are actually replaced. The prospect of losing one's job was serious enough. It is quite another thing to say that, in addition, an employee faces

the prospect of returning to a job with less seniority than the replacements and strikers who abandoned the effort.

In no sense did the vacation policy in the case at bar have any effect whatever upon tenure. Accordingly the hardships which accompanied the effect on tenure are completely lacking here.

Secondly, the super seniority policy necessarily operated to the detriment of participants in the strike, as opposed to non-participants.

This is simply not true here. The criteria for determining eligibility for vacation benefits under the plan announced by the Company was employment on a certain date and the benefits flowed to participants and non-participants. Granting vacation pay to non-participants is certainly no more severe than paying them a salary for their services. No obligation rests upon an employer to pay strike participants their regular salary. Why then should strikers claim entitlement to other monetary rewards for effort expended. The claim that vacation benefits, accruing under the expired contract, were unlawfully withheld is bottomed upon the false premise that the company's own vacation plan was somehow unlawful.

The third aspect of super seniority, which the Court discussed, was the fact that it served as an inducement to strikers to return to work. It was clear from the outset that this was its purpose and its effectiveness was clearly demonstrated.

As we had occasion to discuss earlier, the vacation policy adopted herein could not, by its nature, operate to benefit any striker who returned after it was made known. Under any interpretation of the facts, it is undisputed that the announcement regarding vacation benefits was made in Aug-

ust and it was beneficial only to persons working on July 1, over a month earlier. With reference to withholding benefits which allegedly accrued under the contract, the Company made it quite clear it questioned whether replaced and discharged employees would be entitled to it in any event. It was equally clear that further discussion of the subject would be in order. Nowhere and at no time was there any hint or suggestion from the Company that the strikers might enhance their chances of receiving this claimed vacation pay by returning to work.

We also deem it significant that nearly all the strikers had been replaced by the time the new vacation policy was announced and, for aught that appears, the Company was functioning quite well, without having to induce strikers to return.

The next factor in *Erie Resistor* was the crippling blow the super seniority plan dealt the strike effort. This was quite apparent from events which ensued after its announcement.

No such dramatic results followed either of the acts of wrongdoing attributed to the Company in this case. By the time they occurred most of the strikers had been replaced. This in itself would appear sufficient to deal the strike a crippling blow. The strike in *Erie Resistor* was destroyed within three weeks. In this case it lasted some five months after the incident which is said to occupy the same plane with super seniority.

The last factor the Court discussed in *Erie Resistor* was another effect of the super seniority plan—its effect upon future bargaining. It was noted that the plan made future bargaining difficult, if not impossible.

Not only has it not been demonstrated that later bargaining here was rendered difficult or impossible, quite the contrary appears. Further negotiating was in fact carried

on and the vacation pay was obviously no deterrent. The Company had offered to discuss it but the Union elected not to.

The cleavage between employees, which the Court alluded to in *Erie Resistor*, was clearly the result of ill feelings which might reasonably be expected when some strikers abandon their brethren, forsaking the mutual effort and purpose, and seize the bait offered by the employer to induce a return to his fold. Can it reasonably be urged that such a cleavage would result under the circumstances of the instant case. We think that clearly it would not. To begin with, as we noted previously, there was no bait offered the strikers. Strikers who received anything in the nature of vacation pay first learned they were going to receive it long after their return to work. It could not possibly have been a factor in their decision to return. The same holds true for employees who elected not to strike. The strike commenced on May 16, 1963. The decision not to join the strike had to have been made at that time. Knowledge that there would be vacation pay did not come until August. Once again, something else had to have influenced the employees in their decision not to become strikers.

If any cleavage results from this situation it is precisely the sort of cleavage which results in any strike situation where some employees in the unit elect not to join the strike or, having joined it, elect to return to work. The crucial point is that such cleavage does not result from something the employer said or did.

It is also significant that, in *Erie Resistor*, the company reinstated a number of strikers who remained true to the strike cause until its end. We submit that here we find the seeds of the inevitable discord among employees. These reinstated strikers would be thrust in the midst of those who were induced to abandon the strike and thereby destroyed its effectiveness.

A comparison of this with the instant case again reveals the lack of a valid analogy. Here all of the strikers were replaced and there were none to return with unkind feeling toward those who would not see the strike through to the desired conclusion.

It was felt that the super seniority would seriously impair future bargaining and rightfully so. We submit that unusual is the instance in which seniority is bargained away and, to prevent permanent cleavage, that is precisely what would have to be done.

In contrast, we are here concerned with quite a different item for negotiation—money, a term or condition of employment frequently bargained away. Certainly the matter of vacation pay would be a far less difficult matter to discuss and perhaps compromise. It appears unlikely that any employee would acquiesce in compromising his seniority rights. It would seem much more likely that some of the former employees would seriously consider compromising their claim for accrued vacation pay. The remainder would be free to pursue their remedy in a class action for breach of contract. The outcome of such a suit would lay the matter at rest. It would not have the lingering effects of the super-seniority program, a solution for which could not be found in the courts and probably not very readily at the bargaining table. Unlike the super seniority, the vacation pay would not be re-emphasized or resurrected with each layoff, promotion and the like.

APPLICABILITY OF ERIE RESISTOR

If we might, we would advance the thought that the following quotation from *Erie Resistor* indicates the primary motivation for the holding therein:

> "The history of this strike and its virtual collapse following the announcement of the plan empha-

size the grave repercussions of super-seniority."

And further:

> "As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct."

The employer policy in *Erie Resistor* was a combination of threat and promise. That he was motivated by an unlawful purpose could not be doubted. The Court did no more than apply to him the recognized test of foreseeability. He must have foreseen the results of his program and, inasmuch as he proceeded with its implementation, he must have intended those results. Furthermore, there were results.

The Court was concerned for the right to strike, a right expressly sanctioned by Congress. Congressional sanction was meaningless in the face of what transpired in that case.

To extend the doctrine of *Erie Resistor* to a situation such as that presented here, where there had been no impairment of Congressional solicitude for the right to strike, will only invite further extension into other areas of employer conduct, some of which may have no bearing upon the right to strike. The reasoning in *Erie Resistor* is in effect as follows: the nature of the conduct is such that it will be deemed unlawful unless the Company can in some

fashion demonstrate that it was not. The cloak of guilt is removed only upon a showing of innocence. The effect of this on the burden of proof is readily apparent and the end result of placing the burden on the party complained of is contrary to one ageless aspect of our jurisprudence. We submit that such must remain an exception and not the rule. The Board ignores the extraordinary factual situation which prompted establishment of the exception and thereby overlooks the fact that the holding is exceptional. We submit that later decisions of the Court display a reluctance to extend the holding in *Erie Resistor* and these decisions should govern this case.

Indicative of the above is the decision in *Textile Workers Union of America v. Darlington Manufacturing Company*, 380 U. S. 263, 13 L.Ed. 2d 827, 85 S. Ct. 994 (1965), wherein it was said that the "ambiguous act of closing a plant following the election is not, absent an inquiry into the employer's motive, inherently discriminatory". It was also held that this conduct did not present an *Erie Resistor* situation in which the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions."

Then in *National Labor Relations Board* v. *Brown*, 380 U.S. 278, 12 L. Ed. 2d 389, 85 S. Ct. 980 (1965) it was held that the conduct of a multi-employer group in locking out all employees and operating with replacements in response to a whipsaw strike against one of its members, was not "demonstrably destructive of employee rights" and therefore an inquiry into motive was essential.

In explanation of the holding, the Court said:

> "We begin with the proposition that the Act does not constitute the Board as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining de-

> mands.' *Labor Board v. Insurance Agents*, 361 U.S. 477, 497, 4 L. ed 2d 454, 8 S. Ct. 419. In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or 8(a)(3)."

Finally, we consider the Court's decision in *American Shipbuilding Co.* v. *National Labor Relations Board*, 380 U.S. 300, 13 L.Ed. 2d 855 (1965). The Court below rested its decision primarily upon this case. The device employed by the Company was a temporary lockout to exert economic pressure and thereby enhance its bargaining position. Commenting thereon, the Court said:

> "The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage."

The Court rejected the Board's argument that the lockout was inconsistent with the right to strike.

The Court discussed the *Erie Resistor* case and the type of conduct which carries so compelling an inference of unlawful intention, but added that the lockout did not fall within the category of instances "in which the Board may truncate its inquiry into employer motivation." As in the instant case, there was not the slightest evidence the employer was actuated by a desire to discourage membership in the Union.

Finally, the Court made the following observation, which we feel also applies here:

> "However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."

CONCLUSION

The special and important reasons do not exist for granting a writ of certiorari in this case.

Respectfully submitted.
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